
Rethinking the State Ethics Act

By Jonathan W. Hugg / Apr 01, 2014

Anyone with a matter before local government is familiar with the all-too-common ritual exchanges of consideration that occur. No money may actually change hands, but it still looks like bribery. It certainly is not civic-minded charity. The point is to influence government decision-making.

It can be blatant, as with "pay to play" campaign contributions to a politician's political action committee (always bundled with other contributions solicited for the candidate, never by a corporation, and never to him or her personally). It also can be more subtle, as when an official recommends giving to a specific charity, suggests the gratuitous construction of improvements like parks or trails that generate no revenue for the builder, or simply asks for the hiring of a constituent or a friend. Invariably, the local commissioner or board member will happily claim public credit for the success. Meanwhile, at the very least, the supplicant who made it possible will have strengthened a relationship with a future patron.

There is no thought of any appearance of impropriety, since, without the crass pocketing of cash, and with the pretense of voluntariness, it all seems technically legal, and as a side effect may also promote some worthy endeavor.

However, to the outsider, it is all a cynical and unseemly quid pro quo, which, of course, is the realpolitik of the situation. The refusal of our clients to pay homage to local potentates inevitably puts them at a disadvantage versus their competitors that don ethical blinders. It feels dirty, unfair and disempowering.

Ostensibly, Pennsylvania's Public Official and Employee Ethics Act offers recourse. The high and unequivocal-sounding language of the act is exactly what a good citizen yearning for good government should crave. The legislature affirmed "public office is a public trust" and not a means of realizing "personal financial gain," and set forth a policy of prohibiting conflicts between the financial interest of public officials and the public trust. The legislature established the State Ethics Commission to administer and enforce the statute. The commission has the power to conduct investigations and can recommend criminal prosecution.

The Ethics Act includes an expansive list of restricted activities applying to public officials and employees, candidates and nominees for office, and citizens and businesses attempting to influence them. The most prominent are prohibitions on conflicts of interest and seeking and accepting improper influence.

A conflict of interest is the "use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated."

Improper influence is the offer, giving, solicitation or acceptance of "anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment based on the offeror's or donor's understanding that the vote, official action or judgment of the public official or public employee or nominee or candidate for public office would be influenced thereby."

Violation of the conflict of interest and improper influence provisions is a felony punishable by up to five years in prison or a \$10,000 fine. Financial gain is punishable by treble damages payable to the municipality. The Ethics Act also authorizes restitution and civil penalties. This all sounds very robust and ought to discourage the transactional mentality of many local officials. However, the fundamental flaw is that the politicians who drafted the Ethics Act only expressly proscribed the giving or taking of a "pecuniary benefit" or "anything of monetary value," i.e., money. This was no hard concession to good government.

Notwithstanding the Attorney General's Office recently taping some Philadelphia-area state representatives allegedly accepting cash and gifts, only the most obtuse morality fails to understand that there is something inherently wrong and illegal with the sale of votes. Yet, unfortunately, the result of defining unethical conduct in terms of money is to equate it solely with such vulgar cash payments.

Perhaps intentionally, the language of the Ethics Act ignores the more insidious trade in favors that, even in 2014, still seems endemic, as anyone involved in land development can attest. Pressure and offers for nonfinancial, "in-kind" consideration to induce favorable action create no less real conflicts of interest and are transparent attempts to influence government discretion. These ought to be as illegal as cash bribes.

A second significant problem of using the Ethics Act to prevent misconduct is the secrecy shrouding the process of seeking help from the State Ethics Commission to enforce it. Upon receipt of a complaint "signed under penalty of perjury," the commission "shall conduct a preliminary inquiry." Ideally, local officials ought to think twice if an aggrieved citizen or business has filed a complaint and set in motion a mandatory investigation.

However, the self-interested framers of the Ethics Act were careful to impose a "general rule" of confidentiality over every stage of commission proceedings, through to hearings and petitions for reconsideration. Engaged in self-regulation, and probably sensitive to the vulnerability of their reputations as public figures, those who wrote the Ethics Act no doubt feared public and press knowledge of anything less than a final, formal finding of misconduct. Thus, they empowered the commission to investigate leaks by complainants against them and created a civil cause of action for damages, similar to defamation or abuse of process, where a complainant discloses even the existence of a complaint to the commission.

The idea that a politician could sue a citizen for filing an ethics complaint seems absurd, especially considering that First Amendment protection afforded petitions for redress to government and the fact that speech about political figures is generally not actionable, even in Pennsylvania.

The U.S. Court of Appeals for the Third Circuit seems inclined to agree. In *Stilp v. Contino*, 613 F.3d 405 (3d Cir. 2010), the court held that "the harm caused by disclosing the fact that an Ethics Act complaint was filed, regardless of whether the complaint was frivolous or meritorious, is too negligible and remote to justify a blanket prohibition on such disclosure." The U.S. District Court for the Middle District of Pennsylvania subsequently enjoined the State Ethics Commission from enforcing the Ethics Act to prohibit disclosure of the fact of filing a complaint with the commission, in *Stilp v. Contino*, 743 F.Supp. 2d 460 (M.D. Pa. 2010).

Unfortunately, however, the commission seems not to have accepted these results. There is no mention of the *Stilp* decisions on its website. The commission's regulations still assert that "disclosing publicly or causing to be publicly disclosed the fact that an individual is the subject of a complaint or commission investigation" is wrongful use of the Ethics Act. The commission's guide to the Ethics Act, available on its website, still maintains that "if a public official or public employee has reason to believe a complaint ... was publicly disclosed (a wrongful use of act), such public official/public employee may request that the commission investigate said matter."

Until the commission-or, better yet, the legislature-recognizes that public officials and public employees are public figures, and that aggrieved citizens have an absolute constitutional right to publicize the fact that they have petitioned for the redress of grievances, our clients will be at risk of investigation and retaliatory lawsuits if they attempt to employ the State Ethics Act to deter government misconduct.